

Case No.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KENAI DRILLING LIMITED

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent.

Appeal From The National Labor Relations Board
Case No. 31-CA-128266

PETITION FOR REVIEW

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KENAI DRILLING LIMITED

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(f), Petitioner KENAI DRILLING LIMITED petitions the United States Court of Appeals for the Ninth Circuit for review of, and respectfully requests that the Court set aside, the Decision and Order of the National Labor Relations Board entered on March 31, 2016. A true and correct copy of the Decision and Order is attached hereto as Exhibit “A.”

DATED: April 20, 2016

MUSICK, PEELER & GARRETT LLP

By: s/ Philip Ewen
Attorneys for Petitioner–Appellant
KENAI DRILLING LIMITED

CERTIFICATE OF SERVICE

I, Rachel Avila, hereby certify that on April 20, 2016, I electronically filed the foregoing document described as **PETITION FOR REVIEW** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I also certify copies of the foregoing was served via U.S. Mail, on the following:

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s/ Rachel Avila

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Kenai Drilling Limited and Eddie Stewart III. Case 31-CA-128266

March 31, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On April 13, 2015 Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that maintaining the arbitration policy violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs, and we affirm the judge's rulings, findings, and conclusions¹ and adopt the

¹ The Respondent has excepted to some of the judge's credibility findings, although it does not identify any specific finding. We find it unnecessary to resolve this issue, as the parties stipulated to the material facts of the case.

The Respondent argues that *D. R. Horton*, 357 NLRB 2277 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases.

The Respondent argues that the complaint is time-barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party signed and became subject to the arbitration policy. We reject this argument, as did the judge, because the Respondent continued to maintain the arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has consistently held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration policy, constitutes a continuing violation that is not time-

barred by Sec. 10(b). See *P.J. Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration policy here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, slip op. at 19-21. The Respondent enforced its arbitration policy on February 19, 2014, within the relevant 6-month period before the charge was filed and served in May 2014.

The Respondent contends that the opt-out provision in its arbitration policy places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil*, supra, and *D. R. Horton*, supra. We reject this argument for the reasons given in *On Assignment Staffing Services*, 362 NLRB No. 189 (2015). As the Board explained, an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and *Murphy Oil*. Id., slip op. at 1, 4-5. Further, even assuming an opt-out provision renders an arbitration policy not a condition of employment (or nonmandatory), an arbitration policy precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. Id., slip op. at 1, 5-8. See also *Pama Management*, 363 NLRB No. 38, slip op. at 2 (2015).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, above, slip op. at 22-35, would find that the Respondent's arbitration policy does not violate Sec. 8(a)(1), especially because the policy contains an opt-out provision. He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's policy is just such an unlawful restraint, even considering its opt-out provision. See *On Assignment Staffing Services*, above, slip op. at 4, 8-9 & fns. 28, 29, 31.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the arbitration policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17-18; *Bristol Farms*, above, slip op. at 2.

For the reasons stated by the judge, we agree that employees reasonably would construe the arbitration policy to restrict their access to the Board's processes. See *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enf. 255 Fed.Appx. 527 (D.C. Cir. 2007). See also *Cellular Sales*, above, slip op. at 1 fn. 4. We do not, however, rely on the judge's citation to *Dish Network Corp.*, 358 NLRB 174 (2012). We reject the Respondent's assertion that the policy language stating that "[t]he Arbitrator shall not entertain any statutory claim unless the employee has satisfied any duties to exhaust administrative remedies as required by that statute" expressly permits the filing of unfair labor practice charges with the Board. The quoted language cannot reasonably be read to inform employees of their right to file charges with the Board, especially in light of the policy's broad requirement that "any controversy, dispute or claim" arising out of an employee's employment be submitted to arbitration. The Respondent also asserts that employees reasonably would believe they are permitted to file charges with the Board because Jennifer Phoutrides, the Respondent's Human

recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Kenai Drilling Limited, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

Resources/Training Coordinator, told employees they could go to government agencies with questions about the arbitration policy. We reject this assertion as well. The policy itself does not contain this information, and even if it did, the ability to ask a question about the policy does not mean that employees retain the ability to file a charge. Although our colleague concurs in our finding that employees would reasonably believe that the arbitration policy limited their right to access the Board's processes, we note his view that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims, if the agreement reserves to employees the right to file charges with the Board. We disagree with that view for the reasons stated in *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 3 (2016).

We reject the position of the Respondent and our dissenting colleague that the Respondent's petition to compel arbitration and dismiss class claims was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a state court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." *Id.* at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, above, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

² Consistent with our decision in *Murphy Oil*, above, slip op. at 21, we clarify the judge's remedy by ordering the Respondent to reimburse Stewart and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful petition in state court to compel individual arbitration and dismiss class claims. See *Bill Johnson's Restaurants*, above, at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), *enfd.* 973 F.2d 230 (3d Cir. 1992).

Finally, we shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Notify the Superior Court of California, County of Los Angeles, in Case BC523209 that it has rescinded or revised the mandatory arbitration policy upon which it based its petition to compel binding arbitration, dismiss class claims, and stay action seeking to enforce the arbitration policy in Eddie Stewart III's class action lawsuit and inform the court that it no longer opposes the lawsuit on the basis of the arbitration policy.

(d) In the manner set forth in this decision, reimburse Eddie Stewart III and any other plaintiffs in the class action lawsuit filed against the Respondent in California Superior Court, Case No. BC523209, for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's petition to compel individual arbitration and dismiss class claims.

(e) Within 14 days after service by the Region, post at its Bakersfield, California facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 7, 2013, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since November 7, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's arbitration policy—comprised of its Binding Arbitration Agreement (Agreement), Notice of Binding Arbitration Agreement, Written Acknowledgment of Training, and Binding Arbitration Program Opt-Out Notice—violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because it waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Eddie Stewart III signed the Written Acknowledgment of Training, acknowledging that he understood he could opt out of the Agreement by signing and returning the Opt-Out Notice to the Respondent within 30 days. Stewart did not submit the Opt-Out Notice within 30 days (or at any other time), and later he filed a class action lawsuit against the Respondent in state court alleging violations of the California Labor Code and Business and Professions Code. In reliance on the Agreement, the Respondent filed a petition to compel arbitration and dismiss class claims, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons

explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.² However, I disagree with my colleagues’ finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board’s finding here, similar to the Board majority’s finding in *On Assignment Staffing Services*,³ that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”⁴ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority’s holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

² I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

⁴ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

of non-NLRA claims;⁵ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁶ (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);⁷ and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the class-waiver agreement provisions of the Respondent's Agreement were lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a petition in state court seeking to

enforce the Agreement.⁸ It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's petition to compel arbitration. That the Respondent's petition was reasonably based is also supported by court decisions that have enforced similar agreements.⁹ As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."¹⁰ I also believe that any Board finding of a violation based on the Respondent's meritorious state court petition to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to these issues,¹¹ I respectfully dissent.

⁵ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

⁶ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

⁷ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

⁸ As I explain below, I concur in my colleagues' finding that the Agreement unlawfully interfered with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the Agreement in this regard is not material to the merits of the Respondent's state-court petition to compel the Charging Party to arbitrate his non-NLRA claims. See *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

⁹ See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

¹⁰ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

¹¹ I agree with my colleagues that the complaint is not time-barred under Sec. 10(b) of the Act. Additionally, for the following reasons, I concur in my colleagues' finding that the Agreement unlawfully interferes with NLRB charge filing in violation of Sec. 8(a)(1). The Agreement requires employees to resolve by binding arbitration "any controversy, dispute or claim arising out of or relating to Employee's employment." For the reasons stated in my separate opinion in *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly

KENAI DRILLING LIMITED

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Dated, Washington, D.C. March 31, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. Here, however, the Agreement does not qualify in any way the requirement that “any controversy, dispute or claim arising out of or relating to Employee’s employment” must be resolved in binding arbitration and in this manner only, which appears to preclude the filing of an NLRB charge regarding an alleged violation of the NLRA. See, e.g., *GameStop Corp.*, 363 NLRB No. 89, slip op. at 7 (2015) (Member Miscimarra, concurring in part and dissenting in part). In this regard, I agree with my colleagues that language in the Agreement stating that “[t]he Arbitrator shall not entertain any statutory claim unless the employee has satisfied any duties to exhaust administrative remedies as required by that statute” fails to adequately preserve the right to file charges with the Board. It is true that the filing of an NLRB charge is a prerequisite for the Board itself to investigate and resolve alleged NLRA violations. *Chamber of Commerce v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013) (“Indeed, there is no function or responsibility of the Board not predicated upon the filing of an unfair labor practice charge or a representation petition.”). However, unlike discrimination charges filed with the EEOC or a state agency—where the claims may subsequently be litigated independently by the claimant(s) in federal or state court—employees have no private right to engage in court litigation after the “exhaustion” of NLRB proceedings (except for a party’s right to appeal from an adverse NLRB ruling to the U.S. courts of appeals). See NLRA Sec. 10(f). Moreover, rather than expressing in a reasonably understandable manner that an employee has the right to file an agency or NLRB charge, the above-quoted language merely appears to limit the authority of an arbitrator to resolve statutory claims (if there has been no exhaustion of “administrative remedies”). The possibility of filing an “administrative” charge might be inferred, at least by an attorney, from the reference to exhausting “administrative remedies,” but as noted above, an exhaustion of “administrative remedies” requirement does not even appear applicable to NLRB proceedings. Finally, although the record contains evidence that the Respondent’s Human Resources/Training Coordinator indicated that employees could go to government agencies with questions about the Agreement, this type of advice does not change the scope of the Agreement itself. Therefore, because the breadth of the Agreement appears to preclude the filing of an NLRB charge and nothing in the Agreement appears to indicate otherwise, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting the filing of charges with the Board. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *GameStop Corp.*, above, slip op. at 6–7 (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee’s Restaurant*, above (Member Miscimarra, concurring in part and dissenting in part); *Fuji Food Products*, above, slip op. at 4 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part).

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all its forms, or revise it in all its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in any of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

WE WILL notify the court in which Eddie Stewart III filed his class action lawsuit that we have rescinded or revised the mandatory arbitration policy upon which we based our petition to compel binding arbitration, dismiss class claims, and stay action seeking to enforce the arbitration policy, and WE WILL inform the court that we no longer oppose Eddie Stewart III’s class action lawsuit on the basis of that policy.

WE WILL reimburse Eddie Stewart III and any other plaintiffs in the class action lawsuit filed against us in California Superior Court, Case No. BC523209, for any reasonable attorneys’ fees and litigation expenses that

they may have incurred in opposing our petition to compel individual arbitration and dismiss class claims.

KENAI DRILLING LIMITED

The Board's decision can be found at www.nlr.gov/case/31-CA-128266 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Nicole Pereira, Esq., for the General Counsel.
Robert M. Stone, Esq. and Charles N. Hargraves, Esq.
(Muisick, Peeler & Garrett, LLP), of Costa Mesa, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried in Los Angeles, California, on January 12, 2015. The charge in this matter was filed by Eddie Stewart, III, an individual (the Charging Party) on May 7, 2014, against Kenai Drilling Limited (the Respondent). A complaint issued on September 25, 2014. The sole issue is whether Respondent's maintenance and enforcement of an arbitration agreement and/or rule requiring employees to arbitrate their work-related complaints in an individual capacity, unless they opt-out within 30 days of receiving an employer provided opt-out notice, is unlawful under Section 8(a)(1) of the Act. This case therefore raises issues related to the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

Respondent filed an answer denying the material allegations of the complaint and raised certain affirmative defenses, as discussed below. A hearing in this matter was held before me and the parties filed posthearing briefs. After considering the record and the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Bakersfield, California. Respondent has been engaged as a drilling contractor for the

oil, gas, and geothermal industries. During the 12-month period ending June 2, 2014, Respondent in conducting its operations purchased and received at its Bakersfield, California facility, goods and services valued in excess of \$50,000 directly from points outside State of California. I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

At the hearing, the parties entered into a stipulation of facts which they identified as Joint Exhibit 1. Paragraphs 1 and 2, of the stipulation included the joint request that General Counsel Exhibits 1(a) through 1(p) and Joint Exhibits 2 through 5 will be admitted into evidence without objection. Joint Exhibit 1 page 2-6 beginning at paragraph 3 provides as follows:

3. (a) The charge in this proceeding was filed by the Charging Party on May 7, 2014, and a copy was served on Respondent by U.S. mail on May 9, 2014.

(b) The first amended charge in this proceeding was filed by the Charging Party on July 21, 2014, and a copy was served on Respondent by U.S. mail on July 22, 2014.

(c) The second amended charge in this proceeding was filed by the Charging Party on August 28, 2014, and a copy was served on Respondent by U.S. mail on September 2, 2014.

4. (a) At all material times, Respondent has been a corporation with an office and place of business in Bakersfield, California, and has been engaged as a drilling contractor in the oil, gas, and geothermal industries.

(b) During the 12-month period ending June 2, 2014, Respondent in conducting its operations described above in paragraph 4(a), purchased and received at its Bakersfield, California facility, goods and services valued in excess of \$50,000 directly from points outside the State of California.

5. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. On September 25, 2014, the Acting Regional Director of Region 31 issued a complaint and notice of hearing complaint (GC Exh. 10)). On October 8, 2014, Respondent filed its answer to the complaint and affirmative defenses (answer) (GC Exh. 1(1)). On December 17, 2014, the Regional Director of Region 31 issued an amendment to complaint amending paragraph 4(b) of the complaint (GC Exh. 1(m)). On December 24, 2014, Respondent filed its answer to amended complaint and affirmative defenses. (GC Exh. 1(o)). The complaint and amendment to complaint allege that Respondent engaged in acts and conduct that constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. 29 U.S.C. § 151 et seq. (the Act). Specifically, the complaint and amendment to complaint allege that Respondent interfered with, restrained, and coerced employees in the exercise of their Sec-

tion 7 activities as set forth below:

(a) Since at least January 2007 and at all material times, Respondent has maintained an arbitration policy comprised of the binding arbitration agreement (agreement) (GC Exh. 1(j), Appendix A); the notice of binding arbitration agreement (notice) (GC Exh. IG, Appendix B); the written acknowledgement of training (acknowledgement) (GC Exh. 10, Appendix C) and the binding arbitration program Opt-Out Notice (Opt-Out Notice) (GC Exh. 1(j), Appendix D) (collectively the "arbitration Policy"). The Parties agree to the authenticity and relevancy of these documents, and their admission into evidence, without objection.

(b) At all material times, Respondent has required employees to sign a Written Acknowledgement of Training, which provides that employees would be bound to the Arbitration Policy described in the documents set forth above in paragraph 6(a), unless they opt out within 30 days of receiving the Opt-Out Notice.

7. At no time did Charging Party sign or return the opt-out notice attached to the complaint (GC Exh. 10 as Appendix D), or the opt out notice provided to him during orientation.

8. On February 19, 2014, Respondent asserted its arbitration policy described above in paragraph 6(a), in litigation brought against Respondent by Charging Party in Eddie Stewart III, individually, and on behalf of other members of the general public similarly situated, Plaintiff vs. Kenai Drilling Limited, a Delaware corporation, and DOES 1 through 10, inclusive, Defendant, Case No. BC 523209 (class action complaint) filed in Superior Court of California, County of Los Angeles (Superior Court). A copy of the class action complaint is attached as Joint Exhibit 2. Specifically:

(a) About February 19, 2014, Respondent filed a petition to compel binding arbitration, dismiss class claims, and stay action (motion to compel) and related documents including the following: Memorandum of points and authorities in support of petition to compel binding arbitration; declaration of Jennifer Phoutrides in support [of] Kenai Drilling Limited's petition for an order compelling arbitration and staying proceedings; declaration of Charles N. Hargraves in support of petition to compel binding arbitration, dismiss class claims and stay action; declaration of Kathy Sbmizu in support of petition to compel binding arbitration; declaration of David A. Uhler in support of Kenai Drilling Limited's petition for an order compelling arbitration and motion to stay proceedings pending arbitration (declaration). A copy of the petition to compel and related documents are attached as Joint Exhibit 3.

(b) About March 12, 2014, Charging Party filed Plaintiff's opposition to Defendant's petition to compel arbitration, dismiss class claims, and stay action ("Opposition") and declaration of Eddie Stewart III in support of plaintiff's opposition to Defendant's petition to compel arbitration, dismiss class claims, and stay action. A copy of Charging Party's opposition and declaration is attached as

Joint Exhibit 4.

(c) About March 21, 2014, Respondent filed a reply brief in support of the petition to compel binding arbitration. Dismiss class claims and stay action (reply brief) and related documents including the following: Declaration of Jennifer Phoutrides in Support of Kenai Drilling Limited's reply brief in support of petition for an order compelling arbitrate on and staying proceedings; Kenai Drilling Limited's objections to declaration of Eddie Stewart submitted in support of plaintiff's opposition to Kenai Drilling Limited's petition to compel binding arbitration, dismiss class claims, and stay action; Declaration of Christine Tadd in support of Kenai Drilling Limited's reply brief in support of petition of an order compelling arbitration and staying proceedings; a copy of Respondent's reply brief and related documents is attached as Joint Exhibit 5.

(d) About May 2, 2014, the Honorable Jane Johnson, Judge of the Los Angeles County Superior Court, held a hearing and granted Respondent's petition to compel binding arbitration dismiss class claims, and stay action seeking to enforce the arbitration agreement.¹

The arbitration agreement in its entirety provided as follows:

BINDING ARBITRATION AGREEMENT

A. The following agreement sets forth the binding arbitration agreement between _____ ("Employee") and Kenai Drilling Ltd. ("Kenai") (collectively referred to as "the Parties").

B. Employee understands this binding arbitration program is OPTIONAL. However if Employee chooses not to participate in the binding arbitration program, Employee must send the Opt-Out Notice to Kenai by _____. Opt-Out Notice must be sent to David Uhler, Kenai Drilling Ltd., P.O. Box 2248, Orcutt, CA 93457 and must be received by Kenai by _____. Employee's failure to send in the Opt-Out Notice as set forth in this paragraph will be deemed acceptance of this Binding Arbitration Agreement.

TERMS OF THE BINDING ARBITRATION AGREEMENT

C. By participating in the Binding Arbitration Program, Employee and Kenai agree that any controversy, dispute or claim arising out of or relating to Employee's employment with Kenai Drilling Ltd. ("Kenai"), including the termination of employment all be settled through binding arbitration to be administered by the American Arbitration Association ("AAA").

D. The Parties understand that if the Employee does not opt-out as set forth above in Section B, Employee and Kenai are both giving up all rights to a trial by jury or judge relating to any dispute or controversy arising of Employee's employment with Kenai.

¹ At the risk of some redundancy the entire stipulation is set forth above for the sake of completeness.

E. Unless otherwise specified in this Agreement, the arbitration proceedings shall be governed by AAA's Employment Arbitration Rules ("Rules").

F. Notwithstanding any provision or term set forth in the Rules, the following rules shall apply to all arbitrations conducted under this Agreement:

(1) The arbitrator shall not and does not have the authority to consolidate the claims of different Employees, entertain class actions or representative actions of any kind, or permit joinder.

(2) Summary disposition motions must be entertained by the arbitrator even through the Rules may give discretion to the Arbitrator to hear such motions if any party to this agreement seeks to bring such motion in good faith.

(3) The California Evidence Code shall apply in the arbitration proceedings and any resulting award notwithstanding any provision in the Rules. In issuing the arbitration award or in making a decision relevant to any issue in the arbitration, the arbitrator shall not rely on any evidence that is inadmissible pursuant to the California Evidence Code.

(4) Notwithstanding any provision set forth in the Rules, Employee shall be responsible for all fees and costs that he would normally be responsible for had the action been filed in state court including, but not limited to, filing fees and costs for court reporting services, etc. Each party will be responsible for his or her own attorney fees and costs, unless otherwise ordered by the arbitrator in compliance with statutory law.

(5) The arbitration hearing shall be conducted in Bakersfield, California.

(6) The Arbitrator shall not entertain any statutory claim unless the employee has satisfied any duties to exhaust administrative remedies as required by that statute examples including right to sue letters from the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. (Jt. Exh. 1).

The "Agreement" does not provide for any exceptions for types of claims filed. More specifically, there are no express exceptions for claims filed with the NLRB and/or brought under the specific statutory framework of the NLRA. Nor is there any mention in the agreement regarding how an employee goes about actually initiating an action covered by the arbitration agreement.

Jenifer Phoutrides, Respondent's human resources/training coordinator, described the on-boarding process as it relates to new employees and the arbitration agreement as follows:

Q. Okay. When do you do the training for the new hires?

A. During their new hire enrollment training day; their very first day with Kenai.

Q. Okay. And can you explain to us how you go about giving this training to get employees?

A. I give them the packet, the acknowledgment packet, regarding arbitration along with many other new hire papers. I tell them to read the packet thoroughly and put it to the side because we'll talk about it later. And then I'll go back and then I'll ask everybody if they read the packet. If I have people that say no, I make sure they read it. And then we go forth and answer questions and talk about the policies.

Q. Okay. What documents are included in the packet?

A. It is the acknowledgment training for arbitration and the opt-out form. That's behind it. Acknowledgment form. Yeah.

Q. Is there also some—

A. That's --

Q. —type of a notice?

A. A notice to employees, yes.

Q. Okay. So—

A. The first page is the acknowledgment, then it's the notice and then it's the opt-out form.

Q. And also— is there also a copy of the agreement there as well?

A. Yes.

Q. Okay. So it's four documents?

A. Yes. Sorry.

Q. Okay. That's all right. So you'll ask them to read the four documents?

A. Correct.

Q. And once you see that they have read the documents, do you ask them any questions about them?

A. Yeah. I generally start—I ask them so what do they think arbitration is. People will give me their views your what they think. And then I'll start out with, you know, basically explaining what arbitration is and how to go about it or how to proceed with our procedures—or policy.

With them that I tell them that they have 30 days to decide if they want to opt out or not. It's purely voluntary. We talk about arbitration. Let's see, I try to break it to them in a not simple form, but I tell them that, "Arbitration's another way of settling disputes that they may have with their employment with Kenai. It's purely optional. You have 30 days to decide and you're going to have many remainders in the mail about it with your paycheck stubs up until your opt-out date."

I make them fill their name out on the very first page of the acknowledgment and their new hire date and their opt-out date. They physically fill those dates in themselves. And then throughout the packet, it asks for them to fill in other—or there's other areas on the form where they fill in the opt-out dates, and I make them fill it out as well with their own writing.

Q. Do you discuss the pros and cons of arbitration with them?

A. I do. And I also suggest for them to look it up outside of work if it— on their own if they don't understand it

completely. Pros and cons would be—you know, pros would be, you know—well, pros and cons would be—I guess class action suits are not part of it. So if you choose to be part of the arbitration program, you don't do class actions. And then it's another just way of settling disputes, like—I don't know how to you want me to explain it or how I tell them. I don't—

Q. As best you—

A. Okay. I'm getting nervous. Sorry. So I'll start from the beginning. Okay, "So what is arbitration? Arbitration is another way of settling disputes with your employment"—"about your employment with Kenai. If you go through arbitration, you don't go through normal court settings; you go in front of an arbitrator. The arbitrator's not affiliated with Kenai. It's chosen by a third-party company, AAA, Arbitrators of America and Association (sic)," I believe. "You would plead your side, Kenai pleads its side and the arbitrator makes a decision. The decision's final. You cannot appeal the verdict in arbitration like you can in normal court. So there's plenty of pros and cons that"—"if it's important to you as a personal level, then you need to make a decision on if you want to opt out or not."

Q. You mentioned class actions. Do you tell the employees about any other rights they're giving up if they don't opt out of the arbitration agreement?

A. I touch on the class action suits, I touch on the verdict. You know, you can't appeal it like you can—and that's—that's about it.

Q. Do you tell them whether they have a right to go to a jury trial?

A. As part of arbitration? No. They—they waive that.

Q. Okay. And do you tell them whether they would have a right to a judge—a trial before a judge?

A. Correct. If they choose not to opt out. If they choose—yeah, if they choose to opt out. Sorry.

Q. Then they would. So if they agree—if they don't opt out and they agree to the arbitration agreement—

A. Uh-huh.

Q. —what are they giving up? What do you tell them they're giving up?

A. Oh. Their rights to a judge and jury through—they would have to use arbitration if they choose to use the program.² (Tr. 14–18.)

After the training was completed, employees were required to sign a written acknowledgement of training, which advised that employees would be bound by the Arbitration Policy unless they chose to opt out within 30 days of receiving the Opt-Out Notice. (Jt. Exh. 1.) Charging Party signed the acknowledgment of receipt form but did not sign and return the opt-out form within 30 days. (Jt. Exh. 1.) Thereafter, as noted above,

² It is clear from the testimony of Ms. Phoutrides that she is not a legal expert in the arbitration process, has only a very rudimentary understanding of arbitration in general, and would be unable to advise employees regarding the full panoply of state and federal rights and remedies a person might give up by failing to opt out of the arbitration process.

Charging Party filed a class action complaint and Respondent's efforts to enforce the arbitration were granted via a motion to compel Charging Party to individual arbitration. (Jt. Exh. 1).

III. ANALYSIS AND CONCLUSIONS

The General Counsel and the Charging Party argue that this matter is controlled by the Board's holding in *D. R. Horton*, 357 NLRB 2277 (2012), denied enforcement in relevant part 737 F.3d 344 (5th Cir. 2013). See also *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). In those cases, the Board recognized that, "collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act]." *D. R. Horton*, supra, slip op. at 3. The Board found collective redress in legal or administrative settings are "not peripheral but central to the Act's purposes." *Id.* The Board further found that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions. The General Counsel asserts that, "Respondent requires employees to sign the Acknowledgement as a condition of employment. By signing the Acknowledgement, employees become bound to Respondent's Arbitration Policy unless they take affirmative action to opt-out in the manner and time-frame dictated by Respondent. It is undisputed that Respondent's arbitration policy prohibits collective or class claims in both judicial and arbitral forums." (GC Br. at p. 6.) The General Counsel therefore reasons that Respondent's policy is "unlawful on its face" and violates Section 8(a)(1) of the Act.

Respondent asserts that the charge in the matter was untimely filed and therefore Charging Party is barred from pursuing the claim. Respondent also asserts that the Board's decision in *D. R. Horton* was wrongly decided, that the Board lacks authority to interpret the Federal Arbitration Act, and nevertheless the rationale of *D. R. Horton* should not apply to the facts presented because it contends that its arbitration agreement is "voluntary." Respondent further asserts that the remedies sought by the General counsel are improper. (R. Br. at 10.)

A. D. R. Horton and Murphy Oil Are Controlling

Respondent, relying in part on the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), and *CompuCredit v. Greenwood*, 132 S.Ct. 665, 669 (2012), argues that *D. R. Horton* and *Murphy Oil* were both wrongly decided and should not be controlling in this matter. Respondent further argues that because the Fifth Circuit and other Circuit court's have disagreed with the Board, the reasoning set forth in those cases should control. It must be noted that I am bound by *D. R. Horton* and *Murphy Oil* until either the Board or the Supreme Court overturns them.³ *Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (it is the judge's duty to apply established Board precedent which the Supreme Court has not reversed." and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted); *Los*

³ It is important to note that *D. R. Horton* was not affected by the Supreme Court's decision in *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014), because *D. R. Horton* was not issued by the same Board members whose appointments were held to be invalid.

Angeles New Hospital, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). In view of this obligation, Respondent's disagreement with the legitimacy of the Board's holding in *D. R. Horton* and *Murphy Oil*, and its assertions that the Board's actions were misguided, do not fit within the FAA savings clause, that there is no "Contrary Congressional Command" and/or that the Board exceeded its authority are more appropriately addressed to the Board itself.

Nevertheless, Respondent asserts that even if *D. R. Horton* were properly decided it still would not compel a finding that its arbitration agreement interfered with Charging Party's Section 7 rights. I disagree.

B. The Charge is Not Barred by the Statute of Limitations in Section 10 (b).

As will be discussed in more detail below, many of the issues raised herein by Respondent are the same or similar to those raised and addressed by administrative law judges in numerous other cases. This is a road that has been well traveled. Respondent's timeliness argument is a familiar example. Respondent asserts that, "the conduct at issue occurred long ago and is clearly time barred." (R. Br. at 19.) Respondent's theory is that since the arbitration agreement itself dates back to 2011 and the charge was not filed until May 6, 2014, it is well beyond the 6 months period contemplated by Section 10(b).⁴ This argument ignores well established Board precedent.

The complaint alleged that Respondent maintained and enforced its arbitration agreement. (GC Exh. 1 (j), complaint paragraphs 4(a) and 6.) Respondent in its answer openly admits to both the maintenance and enforcement of the agreement within 6 months of the filing of the charge. (GC Exh. 1(o), R. answer paras. 2 and 5.) The Board has long held that Section 10(b) does not bar an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period since, "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).⁵ See also, *Control Services, Inc.*, 305 NLRB 435 fn. 2 (1991) (holding that Section 10(b) does not bar finding of violation of continually maintained rules), see also *Cellular Sales of Missouri, LLC* 362 NLRB No. 27 (2015). In view of the above longstanding applicable Board precedent and Respondent's admissions that it both maintained and enforced the arbitration agreement, I find that the allegations are not time barred.

⁴ Respondent relies on *Ledbetter v. Goodyear Tire & Rubber Co.*, Inc. 550 U.S. 618 (2007), which arose in the context of Title VII. Respondent's reliance on *Ledbetter* is misplaced as the Court's analysis was openly rejected and superceded by passage of the Lilly Ledbetter Fair Pay Act of 2009 Pub. L. No. 111-2, 123 Stat.5, which amended Title VII to define an unlawful employment practice to occur when an individual is affected by the application of a discriminatory practice. Simply put, *Ledbetter* is no longer good law and hasn't been since at least January 29, 2009.

C. Respondent's Violated Section 8(a)(1) by Maintaining and Enforcing its Arbitration Policy

The Board has long held that concerted legal action addressing wages, hours, and working conditions, whether, in a civil suit, before an administrative agency, or through arbitration, all constitute concerted protected activities under Section 7 of the A t. *D. R. Horton*, supra slip op. at 2-3. In *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978), the Supreme Court held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." In *Le Madri Restaurant*, 331 NLRB 269, 275 (2000), the Board held that the filing of civil suit by employees is protected activity.

There can be no dispute that the Act unambiguously gives employees the right to engage in protected concerted activities without interference from the employer. Respondent's policy on its face prohibits collective or class claims not only in judicial but also in arbitral forms and specifically and unambiguously precludes consolidation of claims, representative actions of any kind, and specifically precludes joinder.⁵ In a nutshell, the arbitration policy by its own terms seeks to deprive employees of the very right to engage in collective activity that Section 7 seeks to protect. The Board has found that if a rule explicitly restricts activities protected by Section 7 of the Act, the rule is unlawful and violates Section 8(a)(1). See *U-Haul Company of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). I therefore find the policy unlawfully restricts and interferes with the employees Section 7 rights to engage in concerted action for mutual aid or protection and on its face violates Section 8(a)(1).

Similarly, I find that since the agreement in question provides that "any, controversy, dispute or claim arising out of or relating to Employee's employment . . . shall be settled through binding arbitration," given the all inclusive nature of the language and without any clear exception for filing a charge with the Board, employees would reasonably conclude that they were precluded from filing an unfair labor practice with the Board.⁶ (GC1(j) Appendix A.) Accordingly, a separate finding of a violation of Section 8(a)(1) predicated on the test and rationale set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), is also warranted. See also, *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB 174, 180-181 (2012); *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

⁵ Member Johnson in his dissent in *Murphy Oil* noted that a policy that didn't permit joinder in and of itself would constitute a violation of the Act. He specifically stated while referring to joinder that, "a prohibition on joint litigation imposed as a condition of employment prevents the exercise of this Section 7 right and does not serve any of the legitimate employer interests." I am in agreement that the prohibition of the joinder of claims in and of itself rises to the level of a separate violation of Sec. 8(a)(1).

⁶ It is important to note that even when the employees are onboarded no attempt is made by Ms. Phourides to specifically advise them regarding whether or not their rights to proceed to the NLRB are affected by the arbitration agreement. (Tr. 14-18.)

I also find, as did the Board in *Murphy Oil*, that Respondent's efforts to enforce the arbitration agreement constituted a separate violation of 8(a)(1). In *Murphy Oil* the Board held that, "it is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights." See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB* 324 U.S. 793 (1945). That is precisely what the Respondent did through its motion to dismiss." The identical reasoning is applicable to Respondent's motion to dismiss in this case.

Respondent attempts to distinguish *D. R. Horton* from the instant matter arguing because its opt-out provision renders the agreement "voluntary" it does not violate the standards set forth by the Board in *D. R. Horton*. At the outset, I disagree with Respondent's characterization of the agreement as "voluntary" or "optional." Voluntary is defined in the *Webster's Third New International Dictionary* (1986) 2564, as "proceeding from the will or from one's own free choice or consent; unconstrained by interference . . . without legal obligation." The agreement doesn't meet even the most basic and understood definition of the term "voluntary." If the agreement was truly "voluntary," the employees would be afforded the opportunity (upon giving the employer reasonable notice), to change their minds (after they had a full and fair opportunity to develop some real knowledge of the working conditions), and notify the employer of their intention to no longer be covered by the agreement if they so desired. The employer's efforts to enforce the agreement make clear that this is simply not the case. If the employees do not affirmatively opt-out they are forever locked into the arbitration agreement regardless of any change in their choice or consent.

Moreover, as noted above, other Administrative Law Judges have addressed the identical issues raised in this case in so far as they relate to the question of whether the maintenance of an arbitration policy with an opt-out provision insulates Respondent from liability. In *24 Hour Fitness USA, Inc.* (Case 20–CA–035419, Nov. 6, 2012), *Securitas Security Services USA, Inc.*, 2013 WL 5984335 (NLRB Div. of Judges Nov. 8, 2013), *Domino's Pizza, LLC*, 2014 WL 1267122 (NLRB Div. of Judges, March 27, 2014), and *RPM Pizza*, 2014 WL 3401751 (NLRB Division of Judges, July 11, 2014), each found that an opt-out provision similar to that presented in this case violated Section 8(a)(1), and constituted an unlawful restriction of core rights granted to employees under Section 7. While these decisions are not binding precedent, I find the reasoning and rationale presented within each to be in line with the Board's rationale set forth in *Murphy Oil* and persuasive. In particular, I agree with my colleagues who have previously held that arbitration policies similar to that in this case were unlawful because the opt-out provision gives employees only a short time (30 days) to irrevocably consider (often times without representation) complex legal rights and consequences, many of which cannot be foreseen by a new employee, and it places upon employees the unreasonable burden of affirmatively making a decision to waive future rights protected under the Act. See *Ishikawa Gas-ket America, Inc.*, 337 NLRB 175–176 (2001); *Mandel Security*

Bureau, Inc., 202 NLRB 117 (1973).⁷

General Counsel supplements this list with its own assertions that:

- (1) The arbitration policy unreasonably imposes upon employees a waiver at a time when employees are unlikely to have notice of employment issues and/or where employees have no notice of their Section 7 right to engage in class or collective activity or that a prohibition on such activity violates Section 8(a)(1) of the Act;
- (2) Even if employees do opt out they are precluded from acting in concert with those who do;⁸

⁷ I am mindful that other Administrative Law Judges have reached contrary results. See for example, *Bloomington's Inc.*, WL 3225945 (June 25, 2013), see also *Valley Health System LLC*, 28–CA–123611, 28–CA–127147 (March 18, 2015). The decisions appear to be contrary to the clear authority set forth by the Board in *Murphy Oil*. In particular, they run afoul of *Murphy Oil's* holding that an arbitration agreement that prevents employees from exercising Section 7 rights, "amounts to a prospective waiver of a right guaranteed by the NLRA."

So too, I disagree with the notion in *Valley Health System LLC* that endorses a requirement that new employees shoulder the burden of paying for and seeking out counsel to preserve the very rights that are guaranteed under federal law. It is this very burden that interferes with the exercise of Section 7 rights.

⁸ One example of such interference comes when concerted activity takes the form of disparate impact cases. In *Griggs v. Duke Power*, 401 U.S. 24 (1971), the Supreme Court held that employment practices that are neutral on their face but have a discriminatory impact can violate Title VII. A plaintiff in such cases need not prove discriminatory intent but rather can establish through the use of statistics the discriminatory impact of the practice or policy. If a policy is neutral on its face and can only be discovered through the use of statistical analysis which requires some extensive investigation and/or discovery of the practices in question, it is highly unlikely that any new employee would meet the 30-day deadline to make an informed decision regarding whether to opt-out or not. Secondly, assuming the individual who discovered a neutral but discriminatory practice had opted-out, he/she may still be precluded from engaging in collective action and obtaining class wide relief to remedy class wide wrongs. In this hypothetical, although class wide discrimination might be present, other affected potential class members are presumably precluded from participating in the class thus defeating numerosity. This would clearly conflict with Section 7's and Title VII's purposes. The Supreme Court has held that, "race discrimination cases are by their very nature class suits involving class wide wrongs." *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). It has even been noted that 23(b)(2) was specifically drafted to facilitate the vindication of civil rights through the class action device. See *5 Moore's Federal Practice Section 23.43[1][b]*, at 23–192(3rd Ed. 2005), see also, *Barefield v. Chevron*, 1899 WL 188433 (N.D. CA 1988). As the Supreme Court implicitly recognized in *Rodriguez* individual relief in many cases is simply inadequate to remedy class wrongs.

It should also be noted that the arbitration agreement, if enforced, would serve to dismantle the private attorney general scheme envisioned by Congress to encourage the effective public enforcement of statutes designed to remedy class wide or systemic wrongs in the employment setting. The fee shifting provisions of these statutes were specifically meant to bridge the gap between the desire of an individual who has been deprived a federal right to see that right vindicated and the financial ability to do so. As noted by Justice Brennan in *Newman v. Piggie Park Enterprises Inc.*, 390 U.S. 400, 401 (1968), by utilizing the private attorney general framework, "Congress sought to capitalize

(3) Requiring employees to preserve their Section 7 rights in an unlawful burdening of their Section 7 rights; and

(4) The opt out procedure by its nature requires new employees to self identify at a time when they are particularly vulnerable as new employees and thus the agreement significantly burdens the right to engage in collective action.

I concur with General Counsel that all of the above considered individually and together offer valid and compelling rationale from which to conclude that the arbitration agreement unlawfully restricts core rights. General Counsel asserts and I agree that requiring employees to “self identify” burdens employee’s rights. This is especially true when as in this case the person notified of the decision is a high ranking company official. See *Special Touch Home Care Services*, 357 NLRB 4 (2011), holding that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right.

In my view, the issue runs deeper than simply “self identification.” One of the two pillars of concerted activity is the recognition that there is strength in numbers and with this strength comes the balancing of power between employers and employees. Judge Dawson in *RPM Pizza*, 2014 WL 3401751 (NLRB Division of Judges, July 11, 2014), eloquently touched upon this when she noted that a similar opt-out provision, “creates a smokescreen and serves to restore the inequity” the Act intended to address. The second pillar of concerted activity revolves around the notion that that along with strength in numbers there is the perception of safety in numbers. Indeed, the Act specifically references the right to engage in concerted activities for “protection.” It is no doubt much easier for an employer to take an adverse action against a single “self identified” employee who complains about terms and conditions of employment or opposes an unlawful employment practice than it is to terminate a whole class of employees. Member Miscimara in *HTH, Pacific Beach Corp.*, 361 NLRB No. 65, 69 (2014), observed that, “the NLRA is unique among federal employment statutes. The core focus of the NLRA relates almost exclusively to the manner in which employees interact collectively and in support of one another.” He further observed that, “all of these protections have meaning only if employees have support from other employees” Id.

The arbitration agreement by its very nature compels employees to act alone and strips them of the very support and “protection” that the Act intends to provide. It essentially deprives them of the core right to act in concert with others for “protection.” The chilling effect on the exercise of an employee’s rights by requiring that the employee act alone and without the “protection” of banding together with his or her fellow em-

on the happy coincidence that encouraging private actions would, in the long run provide effective public enforcement.” As the Court also noted in *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 617 (1997), “the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry recoveries into something worth someone’s (usually an attorney’s) labor” (citations omitted).

ployees is unquantifiable and immeasurable but very real. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (wherein the Board held that the mere maintenance of work rule by employer will violate Act where the rule is likely to have a chilling effect), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). A perfect example arises repeatedly in cases of sexual harassment wherein a victim endures harassment because of fear.⁹ Oftentimes, these victims can find the courage to complain about the harassment only when others who have also been victimized are willing to stand with them to face the harasser. This is the very kind of support intended by the Act when it guaranteed employees the right to engage in concerted activities for “mutual aid or protection” and the very kind of support the arbitration agreement removes.

For the foregoing reasons, I find that Respondent’s maintenance of and requirement that employees enter into its arbitration agreement, as set forth above, as a condition of employment, unlawfully restricts core rights granted to employees under Section 7 of the Act and violates of Section 8(a)(1) as alleged in the complaint.

CONCLUSIONS OF LAW

(1) The Respondent, Kenai Drilling Limited, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

(2) At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that waives the rights of its employees to file and maintain class and collective actions in all forums, arbitral and judicial, and is applicable to all employees who fail to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted to each employee.

(3) The above violations are unfair labor practices within the meaning of the Act.

(4) The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent’s arbitration policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees (in all of its facilities in which the arbitration policy has been implemented) that the policy does not constitute or require a waiver in all forums of their right to maintain or participate in collective and/or class actions, and shall notify employees of the rescinded or revised policy by providing them a copy of the revised policy or specific notification that the policy has been rescinded. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its em-

⁹ See for example, *Fresh & Easy Neighborhood Market Inc.*, 361 NLRB No. 12 (2014), which held that that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment allegation is acting for the purpose of mutual aid or protection.

employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

Respondent shall also notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement that the underlying basis of its objection to the pursuit of any class or collective action was found to be violative of Section 8(a)(1) of the NLRA, and as such, the request to enforce or compel arbitration was void ab initio. It shall also notify the tribunal that in order to comply with federal law, Respondent desires to withdraw and/or vacate any such motion or request to compel arbitration and that Respondent no longer objects to the participation of its employees in such class or collective actions.

The General Counsel asks that Charging Party be reimbursed for any litigation expenses directly related to opposing Respondent's action to enforce its arbitration agreement. Respondent argues that the award of litigation expenses is improper. The Board in *Murphy Oil* directly considered the issue and stating, "consistent with the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration. See *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act.")" In view of the Board having directly addressed the issue, and in reliance upon the Board's decision, I find that the award of litigation expenses with interest is appropriate. The applicable rate of interest on the reimbursement shall be determined as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Kenai Drilling Limited, Bakersfield, California, its officers, agents and representatives shall

1. Cease and desist from

(a) Maintaining, enforcing, seeking to enforce any arbitration agreement (the agreement) or policy that waives the right of employees to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees who fail to opt out.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation in all arbitral or judicial forums.

(c) In any like or related manner interfering with, restrain-

ing, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the agreement, in all forms and places, to make clear to employees that the agreement does not constitute or require a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

(b) Reimburse Charging Party, Eddie Stewart, III for all reasonable expenses and legal fees, with interest incurred in opposing Respondent's unlawful motion to dismiss and compel arbitration.

(c) Notify employees of the rescinded or revised policy by providing them a copy of the new revised policy and/or specific written notification that the policy has been rescinded.

(d) Notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement that the underlying basis of its objection to the pursuit of any class or collective action was found to be violative of federal law, and as such, the request to enforce or compel arbitration was void ab initio. Notify the tribunal that in order to comply with federal law, Respondent desires to withdraw and/or vacate any such motion or request to compel arbitration and that Respondent no longer objects to the participation of its employees in such class or collective actions.

(e) Within 14 days after service by the Region, post at its facilities where the Agreement has been or is in effect, copies of the attached notice marked Appendix. Copies of this notice, on forms provided by the Region Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2011.¹¹

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 13, 2015

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a binding arbitration agreement (the agreement) that waives the right of employees to maintain or engage in class or collective actions in all forums arbitral or judicial.

WE WILL NOT require employees to sign binding arbitration agreements that waive the right to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT in any manner enforce and/or seek to enforce any arbitration agreement found to be in violation of the National Labor Relations Act by filing motions to dis-

miss and/or motions seeking to compel individual arbitrations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

WE WILL rescind or revise the agreement at all facilities where it has been implemented and is currently in effect and make it clear to employees that the agreement does not constitute a waiver of their right to maintain or engage in employment-related class or collective actions.

WE WILL notify our employees of the rescinded or revised agreement by providing to them a copy of the revised agreement or specific notification that it has been rescinded.

WE WILL reimburse Charging Party, Eddie Stewart, III for all reasonable expenses and legal fees, with interest incurred in opposing Respondent's unlawful motion to dismiss and compel arbitration.

WE WILL notify any tribunal where we have pursued the enforcement of our arbitration agreement that the underlying basis of our objection to the pursuit of any class or collective action was found to be violative of federal law, and as such, our request to enforce or compel arbitration was void ab initio. Further, we will advise the tribunal that in order to comply with federal law, we desire to withdraw and/or vacate any such motion or request to compel arbitration and that we no longer object to the participation of our employees in such class or collective actions.

KENAI DRILLING LIMITED

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